UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT DAYTON

GAREY E. LINDSAY, Regional Director
of the Ninth Region of the National Labor
Relations Board, for and on behalf of the
NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

Civil No. 3:17-cv-00126
Judge Rose

MIKE-SELL'S POTATO CHIP COMPANY

Respondent

MEMORANDUM IN SUPPORT OF PETITIONER'S
MOTION TO ADJUDICATE BASED UPON AFFIDAVIT EVIDENCE

Counsel for Petitioner respectfully submits that the subject case could be expedited, while avoiding duplicative litigation and conserving the time and resources of the Court and the parties, if it were litigated on the basis of affidavit evidence and exhibits submitted to the Court. The statutory scheme involved fully supports such a procedure.

In ruling on whether to grant the preliminary injunctive relief sought by the Board pursuant to 29 U.S.C. at Section 160(j), the District Court's role is properly limited to determining whether there is reasonable cause to believe that a respondent has violated the National Labor Relations Act, herein called the Act, and whether temporary injunctive relief is just and proper. *Kobell v. United Paperworkers International Union, et al.*, 965 F.2d 1401, 1406 (6th Cir. 1992); *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987). In addition, petitions under Section 10(j) of the Act receive statutory priority in the United States district courts under 28 U.S.C. Section 1657(a).

In light of this statutory scheme, it is well settled that district courts in proceedings under Section l0(j) are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the petitioner has

"reasonable cause" to believe that respondent has violated the Act. See, e.g., *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d 953, 958-959 (1st Cir. 1983); *Kobell v. United Paperworkers Int'l. Union*, 965 F.2d 1401, 1406-1407 (6th Cir. 1992); *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 371-372 (11th Cir. 1992); *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 748 (9th Cir. 1988); *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1032-1033 (2nd Cir. 1980); *Gottfried v. Samuel Frankel, et al.*, 818 F.2d 485, 493 (6th Cir. 1987); *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1191 (5th Cir. 1975), cert. denied 426 U.S. 934 (1976); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1083-1084 (3rd Cir. 1984); *Levine v. C & W Mining Co., Inc.*, 610 F.2d 432, 435 (6th Cir. 1979). Moreover, it is reversible error for a district court to go beyond this limited inquiry and to make findings on the ultimate merits of the charge. See, *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d at 958-959; *Arlook v. S. Lichtenberg & Co.*, 952 F.2d at 372-373; *Scott v. El Farra Enterprises, Inc., d/b/a Bi-Fair Market*, 863 F.2d 670, 676 (9th Cir. 1988).

The District Court is not called upon to resolve disputed issues of fact or the credibility of witnesses; this function is reserved exclusively for the Board in the underlying administrative proceeding. See, *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d at 958-959; *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570, 1571 (6th Cir. 1996); *Kobell v. United Paperworkers Int'l. Union*, 965 F.2d at 1407; *Fuchs v. Jet Spray Corporation*, 560 F. Supp. 1147, 1150-1151 at n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. l983). [1/]

Indeed, it is settled that, in these preliminary proceedings, the courts should give the petitioner's version of the disputed facts the "benefit of the doubt," and should accept the reasonable inferences he draws therefrom if they are "within the range of rationality." *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 36-37 (2nd Cir. 1975); Accord: *Maram v. Universidad*

[1/] See also, *Jaffee v. Henry Heide, Inc.*, 115 F. Supp. 52, 57 (S.D.N.Y. 1953); *Fusco v. Richard W. Kaase Baking Co.*, 205 F. Supp. 465, 476 (N.D. Ohio 1962); *Taylor v. Circo Resorts, Inc.*, 458 F. Supp. 152, 154 (D. Nev. 1978); *Hoffman v. Cross Sound Ferry Service, Inc.*, 109 LRRM 2884, 2887 (D. Conn. 1982).

Interamericana de Puerto Rico, Inc., 722 F.2d at 958-959; *Arlook v. S. Lichtenberg & Co.*, 952 F.2d at 371-372; *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051 (2nd Cir. 1980); *Kobell v. Suburban Lines, Inc.*, 73l F.2d at 1084; *Levine v. C & W Mining Co., Inc.*, 610 F.2d at 435.

Accordingly, in view of the petitioner's "relatively insubstantial burden of proof," [2]/ it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" has been established. See, *Gottfried v. Samuel Frankel*, 818 F.2d at 493 - 494; *Aguayo v. Tomco Carburetor Co.*, 853 F.2d at 750-751.

In view of the foregoing, the weight of judicial authority holds that it is proper for a district court to base its "reasonable cause" determinations in Section 10(j) cases upon evidence presented in the form of affidavits. See, *Sharp v. Webco Industries Inc.*, 225 F.3d 1130, 1134 (10th Cir. 2000); *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541, 546 (9th Cir. 1969); *Aguayo v. Tomco Carburetor Co.*, 853 F.2d at 750-751; *Kennedy v. Teamsters, Local 542*, 443 F.2d 627, 630 (9th Cir. 1971); *Squillacote v. Automobile, Aerospace & Agricultural Implement Workers*, 383 F. Supp. 491, 493 (E.D. Wis. 1974).

Finally, neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding, *Kennedy v. Sheet Metal Workers*, 289 F. Supp. 65, 87-91 (C.D. Cal. 1968), [3]/ and such procedures do not deny a fair hearing or due process to respondent. See, *Aguayo v. Tomco Carburetor Co.*, 853 F.2d at 750-751; *Asseo v. Pan American Grain Co.*, 805 F.2d at 25-26; *Gottfried v. Samuel Frankel*, 818 F.2d at 493; *Kennedy v. Teamsters, Local 542*, 443 F.2d at 630. Cf. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263-264, 107 S.Ct. 1740 (1987) (Secretary of Labor may order temporary

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[2]/ *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084; *Levine v. C & W Mining Co.*, 610 F.2d at 435; *Gottfried v. Samuel Frankel*, 818 F.2d at 493; *Aguayo v. Tomco Carburetor, Inc.*, 853 F.2d at 748.

[3]/ There is nothing in the text of Section 10(j) that mandates oral testimony in these proceedings. *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d at 546.

reinstatement of unlawfully discharged employee pending full administrative hearing; not a denial of due process to deny respondent full evidentiary hearing at preliminary stage).

The submission of this Section 10(j) matter on the affidavits submitted by the petitioner will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve the time and resources of the court and the parties. Such procedure fully comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Section 1657(a) and the original intent of the 1947 Congress which enacted Section 10(j). See, *Legislative History LMRA 1947*, 414, 433 (Government Printing Office 1985).

Based on the foregoing, petitioner respectfully requests that its motion to adjudicate this case on affidavit evidence be granted and that the Court thereafter enter an injunction enjoining respondent's unlawful conduct as prayed for in the petition filed with the Court on April 17, 2017.

Dated: May 5, 2017

/s/ Eric A. Taylor

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CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1(f)

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CERTIFICATE OF SERVICE

May 5, 2017

I hereby certify that on this date I filed the foregoing with the Clerk of Court, and I hereby certify that I have also sent notification electronically to the following and by United States Postal Service:

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